matters. We do not desire to continue to represent a client of this type. We have requested him to have other attorneys substituted in our place, but he has paid no attention to our requests. We wish to drop all of his matters, but we do not wish to be accused of having been unfaithful to the trust originally reposed in us as attorneys by this client.

We would appreciate advice from you as to the manner in which we should proceed in order to be permitted to cease acting as his attorneys.

ANSWER:

Upon the facts as stated, the Committee does not consider that the attorneys are required by any professional obligation to continue to represent the client; it is of the opinion that a peremptory notice to the client that after a certain specified date, sufficiently far away to enable him to secure and substitute new attorneys, they will not act as his attorneys, is proper. This answer, however, does not deal with the attorney's legal right to compensation upon taking such course, nor with the legal procedure essential thereto.

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PARTNERSHIPS—LIABILITY FOR TORT—MARSHALLING ASSETS—The right of a creditor holding a joint and several claim against the members of an insolvent firm, to share in the partnership and individual assets under concurrent general and separate assignments, was fully recognized in a recent, highly interesting New York case.[1] A judgment recovered in a tort action against "Girard N. Whitney and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney and Kitchen," was held conclusive evidence of a creditor's claim, and binding as such on the assignee, who was directed to pay dividends on it from both the firm and individual assets.

The recovery of a judgment, whether in tort or upon a contract, establishes a debt which the defendant is under obligation to pay, the law implying a promise or contract on his part to pay it.[2] And this is true whether the judgment is recovered against the co-partners before assignment, or against the co-partners and the assignee after assignment.[3] Such debt being properly established, the only question of importance to be considered in connection with the marshalling of assets, is whether it is joint or joint and several.

The joint and several liability of co-tort-feasors and the attendant right, upon recovery of a judgment, to complete satisfaction by levy upon both the joint and several property is as old as the common law itself; and practically as old as the first recognized partnership is the doctrine that upon the commission of a tort by the partnership or by any single member—within certain limitations—the individuals comprising such partnership

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[1] *In re* Peck, 99 N. E. Rep. 258 (N. Y., 1912).

[2] Gutta Percha Co. v. Mayor of Houston, 108 N. Y. 278 (1888). But see Louisiana v. Mayor of New Orleans, 109 U. S. 285 (1883), holding that a judgment recovered upon an action in tort cannot be considered as a contractual obligation within the meaning of that clause of the Federal Constitution which prohibits the various States from passing any law "impairing the obligation of a contract."

[3] Ludington's Petition, 5 Abb. N. C. 322 (N. Y., 1878). The same is true in cases of bankruptcy. Collier on Bankruptcy, 4th Edit., page 449.

become co-tort-feasors, and as such, jointly and severally liable. The standing of a claim based upon such tort in the event of insolvency and subsequent assignment was the question confronting the Court in *In re Peck*.[4] Since the burdens incident to joint and several liability may, for our purposes, be considered similar whether arising under an express contract or by operation of law,[5] and since by far the greater number of adjudications on the subject have resulted from a contractual liability, it would seem that a study of this class of cases will best enable us to understand the decision in the principal case.

While the liability of partners for firm debts is oftentimes spoken of as joint and several, this should be taken to mean only that a partnership creditor has recourse to the individual assets after the exhaustion of the partnership estate.[6] A firm creditor, at law, could levy his execution upon firm assets, or upon the separate property of a partner at his option: and if he obtained a lien on his separate property, he could enforce it although he thereby exhausted this estate and left the separate creditor with a claim against a penniless debtor. A different doctrine, however, was early established in equity, and Lord Cowper in *Ex parte Crowder*[7] laid down the now familiar rule that partnership property belongs to partnership creditors, and individual property to individual creditors. Lord Thurlow repudiated this doctrine,[8] but Lord Rosslyn succeeded in establishing it so thoroughly[9] that Lord Eldon,[10] although expressing preference for Thurlow's rule, declined to unsettle the doctrine adopted in the early cases and restored by his immediate predecessor. While the rule has been embodied in the bankruptcy statutes of England[11] and this country,[12] it has been rejected or modified by the equity Courts of Connecticut,[13] Vermont,[14] South Carolina[15] and Kentucky.[16]

So much for the rule applied where the creditor has a claim against either the firm or the separate partners. But suppose he has taken the precaution to obtain the obligation of the firm, and the several obligations of the partners for the same debt, or suppose

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[4] 99 N. E. Rep. 258 (N. Y., 1912).

[5] Morgan v. Skidmore, 3 Abb. N. C. 92 (N. Y., 1870). In England, taking judgment against one or more co-tort-feasors ends the right to take judgment against the remainder; *contra*, however, in America, Burdick on Torts, page 225.

[6] "The only foundation for the statement is that partnership creditors are allowed to come into equity to obtain payment from the estate of a deceased partner, which is not liable at law." Harriman on Contracts, §358.

[7] 2 Vern. 706 (1715).

[8] *Ex parte* Copland, 1 Cox Eq. 420 (1787).

[9] *Ex parte* Elton, 3 Ves. Jr. 238 (1796).

[10] *Ex parte* Kensington and Taylor, 14 Ves. 447 (1808); Dutton v. Morrison, 17 Ves. 193 (1815).

[11] Bankruptcy Act of 1883, §§ 43–59.

[12] U. S. Bankruptcy Act of July 1, 1898, § 5, (*d*), (*e*) and (*f*).

[13] Camp v. Grant, 21 Conn. 41 (1851).

[14] Bordwell v. Perry, 10 Vt. 292 (1847).

[15] Hutzler Bros. v. Phillips, 26 S. C. 136 (1886).

[16] Fayette Bank v. Kenny, 79 Ky. 133 (1880).

the law has stepped in and presented him with those obligations, as in the case of a partnership tort, certainly he ought to have the benefit of the caution which he has used, or the rights which the law has bestowed, as the case may be. The English Courts, however, early reached a different conclusion, and in one of the first reported cases, it was said to be settled that the advantage of a joint and separate creditor is no more than that he can elect whether he will be in the final instance a joint *or* separate creditor; and although it was admitted that "at law such a creditor may proceed against both debtors at the same time until his debt is fully satisfied, yet the equity of this Court inclines that all persons should have an equal satisfaction, and not one more than the other."[17] The rule against double proof has been so modified by statute that the remnant is practically of little consequence to partners or their creditors today.[18] The early English rule never found favor in this country either in equity proceedings[19] or under the Bankruptcy Act.[20] In some American jurisdictions, the English rule has been rejected because the reason usually given for it that those jointly and severally liable cannot be sued at one and the same time, but the creditor must make his election,[21] does not exist, inasmuch as the double remedy is permitted in suits at law.[22] This is true in but few States, however, so some other reason must be found to support the numerous decisions in other jurisdictions. And this reason is found in the simple principle which Lord Eldon admitted as true in all justice, but which he did not dare to establish as law, that a creditor ought to have "the benefit of the caution he has used." And this principle means that in every case where an action can be maintained on contract against an individual without joining with him the other persons composing the partnership or interested in the joint venture, there a separate and independent personal liability exists as against individual assets, and the person entitled to bring such action is likewise entitled to prove claims and draw dividends from both the firm and individual assets. And if this is true of marshalling the assets in equity where the separate obligation of the individual partner rests in contract, it ought to be no just ground of objection to compensation for a wrong that it would

[17] *Ex parte* Bond and Hill, 1 Atk. 98 (1745); *Ex parte* Bevan, 10 Ves. 107 (1804).

[18] Lindley on Partnership, Eighth Edit., page 872. Sched. II, § 18, of the English Bankruptcy Act of 1883 provides for double proof in certain contract cases, but frauds and torts under which joint and several liability arises have been held not to be included in the words of the section. Lindley, *supra*. But in *In re* Parkers, 19 Q. B. D. 84 (1887) double proof was permitted where the firm misappropriated funds handed to it for investment by one of the partners who was trustee of the funds.

[19] *Ex parte* Nason, 70 Me. 363 (1880); National Bank v. Hall, 160 Mass. 171 (1893).

[20] *In re* Bigelow, Fed. Cases, 1397; Emery v. Bank, Fed. Cases, 4446.

[21] *Ex parte* Rowlandson, 3 P. W. 405 (1735).

[22] Turner v. Whitmore, 63 Me. 526 (1874).

result in a similar distribution. In the words of Rappallo in *Morgan* v. *Skidmore*[23] "if it is equitable where the partner has agreed to assume the individual obligation, it is equally equitable where the law compels him to assume it as a just compensation due to the party whom he has misled."

It would seem then, that the principle applied in *In re Peck* is fundamentally correct. The only question that might arise is whether or not the judgment creditor who had already been paid a dividend from the joint estate should have been allowed a dividend from the separate estate on the full amount of his judgment. *Ex parte Nason*[24] says "no" to this question. Since, however, the failure to prove against the individual estate was the result of the assignee's action, rather than the creditor's inaction, it is probably just that the creditor should not thereby be prejudiced.

*H. W. W.*

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SURETYSHIP—DURESS UPON THE PRINCIPAL—The surety on a bond defended on the ground that she signed because of the threats made by the plaintiff, obligee in the bond, to prosecute her son-in-law for forgery of the plaintiff's name. It was held that the defendant could avoid liability by showing that the threats deprived her of the free exercise of her will, notwithstanding the duress was not imposed upon her and the threats were not made to her directly.[1]

The common law doctrine of duress is summed up in *Baker* v. *Morton*.[2] "Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress." A statement of the doctrine in negative form is given by Blackstone.[3] "A fear of battery or being beaten, though never so well grounded is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages."

Modern decisions hold that there is duress if the contract be procured by threats of a battery,[4] or, if there be an actual or

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[23] 3 Abb. N. C. 92 (N. Y., 1870).
[24] 70 Me. 363 (1880).

[1] Fountain v. Bigham, 235 Pa. 35 (1912).
[2] 79 U. S. 150, 158 (1870); Richardson v. Duncan, 3 N. H. 508 (1826).
[3] Book I, page 131.
[4] Love v. State, 78 Ga. 66 (1886); Foshay v. Ferguson, 5 Hill (N. Y.) 154 (1843); Central Bank v. Copeland, 18 Md. 317 (1862).